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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAMES BROWN,
Petitioner,
v.
SECRETARY OF THE ARMY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 114(2) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-16(d) (1994), permits an award against the United States of interest on attorneys' fees and expenses incurred before enactment of the legislation.

PARTIES TO THE ACTION

Plaintiff

James Brown

Defendant

Secretary of the Army

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner James Brown discloses that he is not a corporate entity and therefore has no parent company or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated March 12, 1996, is reported at 78 F.3d 645 and is reproduced at pages 1a-18a of the appendix to this petition ("App."). The opinion of the Court of Appeals, dated June 14, 1996, denying rehearing and rehearing *in banc* is reported at 86 F.3d 225 and is reproduced with accompanying Orders at App. 30a-35a. The opinion of the United States District Court for the District of Columbia regarding the award of interest on attorneys' fees and expenses, dated November 21, 1994, is reported at 868 F. Supp. 15 and is reproduced at App. 19a-26a. The Order of the district court dated November 21, 1994, awarding plaintiff interest on attorneys' fees and expenses is reproduced at App. 27a. An Order dated November 23, 1994, correcting the November 21, 1994 Order is reproduced at App. 28a-29a.

JURISDICTION

Appellate jurisdiction in the United States Court of Appeals for the District of Columbia Circuit was based on 28 U.S.C. § 1291 (1994). The opinion of that Court was issued on March 12, 1996. An order denying petitioner's timely request for rehearing and rehearing *in banc* was entered June 14, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

This case involves Section 114(2) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-16(d) (1994), which provides in relevant part that:

> The provisions of section 2000e-5(f) through (k) of this title . . . shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[]

The text of 42 U.S.C. § 2000e-5(k) (1994) states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Petitioner, James Brown ("Plaintiff") is the prevailing party in a lawsuit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994). *See Brown v. Marsh*, 713 F. Supp. 20 (D.D.C. 1989), *aff'd*, 918 F.2d 214 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 810 (1991). Brown filed a Motion for Payment of Attorney's Fees and Expenses with the district court on

February 5, 1991 pursuant to the Civil Rights Attorney's Fees Act, 42 U.S.C. § 2000e-5(k).[1]

On November 21, 1991, while plaintiff's fee petition was pending, the President signed into law the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) ("the 1991 Act"). Section 114 of the 1991 Act states:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[]

42 U.S.C. § 2000e-16(d). By incorporating 42 U.S.C. § 2000e-5(k), § 114 specifically provides that prevailing plaintiffs may recover interest on attorneys' fees awarded against the federal government. 42 U.S.C. § 2000e-16(d).

The attorneys' fee provision of § 114 was enacted in response to this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), which held that interest on attorneys' fees to compensate for delayed payment was not available against the United States absent an express waiver of sovereign immunity for interest. Section 114 expressly provided the waiver that the *Shaw* Court found lacking. *See* H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 87 (1991).

A. The District Court's Decision

The District Court awarded Brown certain attorneys' fees and expenses. *See Brown v. Marsh*, Civ. A. No. 80-1169 (CRR), 1992 U.S. Dist. LEXIS 132465 (D.D.C.

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[1] The attorneys' fees and expenses (referred to collectively as "attorneys' fees") at issue in this appeal are those incurred for the work of the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("the Washington Lawyers' Committee") and the law firm of Reed, Smith, Shaw & McClay ("Reed Smith"), who entered their appearances in this matter in the Fall of 1987.

Aug. 28, 1992). Following this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994), which reaffirmed the holding in *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), that a statute authorizing attorneys' fees permitted award of fees for pre-enactment legal services, Brown filed a motion seeking interest to compensate for the four-year delay in payment of attorneys' fees and expenses.[2]

On November 21, 1994, the district court, guided by this Court's decision in *Landgraf*, ruled that § 114's provision relating to attorneys' fees applied to cases pending at the time of its enactment, and awarded plaintiff interest on his attorneys' fees and expenses.[3] The district court cited three principal reasons for its decision to award plaintiff pre-Act interest. First, the district court explained that because an award of interest on attorneys' fees had always been available against private parties under the attorneys' fees statute, § 114 merely extended a preexisting right without substantively changing prior law. App. 23a-24a. Second, it determined that because attorneys' fees are "uniquely separable" from the main cause of action, interest awards on those fees are also "collateral" within the meaning of *Landgraf*. App. 24a. Finally, the district court found that § 114 provided a waiver of sovereign immunity without creating a new substantive obligation for the Government. *Id.* The Government appealed the district court decision.[4]

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[2] The services were performed from 1987 to 1991 and interest was accrued from January 1, 1988 through August 20, 1992, the date that the district court ordered that plaintiff was entitled to these fees. While the Government paid the fees in August 1992, it did not pay the interest.

[3] The court computed interest using the post-judgment interest rate. *See* 28 U.S.C. § 1961(a) (1994).

[4] Plaintiff filed a cross-appeal arguing that he is entitled to prejudgment interest at the prime rate rather than at the post-judgment interest rate prescribed by 28 U.S.C. § 1961(a). Because the Court of Appeals never reached this issue, plaintiffs do not raise the issue here.

B. The Court of Appeals Decision

On appeal, the Government argued § 114 should not be applied to pre-enactment conduct because to do so would violate the rule of *Landgraf*. It argued that § 114 affects substantive rights and thus could not be applied retroactively.[5] The Government did not argue that federal sovereign immunity barred an award of interest. In fact, it effectively conceded that § 114 of the Civil Rights Act of 1991 expressly waived the Government's sovereign immunity.[6] The sovereign immunity issue was first raised by the Court of Appeals *sua sponte* only days before oral argument. By Order dated November 9, 1995, the Court of Appeals directed the parties to be prepared to address at oral argument without supplemental briefing whether the federal government's sovereign immunity from suit barred retroactive application of § 114.

At argument, plaintiff suggested to the Court that the proper method of analysis was to determine first whether there had been an express waiver of sovereign immunity, and then if so, to analyze whether the statute had an impermissible retroactive effect using the methodology approved by this Court in *Bradley* and *Landgraf* with respect to legislation affecting private parties.

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[5] As a semantic matter, the Court in *Landgraf* held that statutes that would impair substantive rights would operate "retroactively," and thus should not be applied to pending cases. 114 S. Ct. at 1505. Procedural or collateral legislation like attorneys' fees statutes, which *are* properly applied to pending cases, specifically are not, in the Court's parlance, "retroactive." In the proceedings below, however, the district court and the Government used the term "retroactive" in a non-judgmental sense, to refer to any application of a statute to pending cases, without judgment as to whether that statute impairs substantive rights. For purpose of this petition, the term "retroactive" is used in the latter sense.

[6] The Government further conceded that other attorney's fees provisions such as § 113 of the 1991 Act (expanding the category of expenses, such as expert witness fees, that may properly be included as attorney's fees in Title VII cases) are to be applied retroactively. *See* 42 U.S.C. § 2000e-5(k).

The United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court. App. 18a. The Court of Appeals, relying on *Library of Congress v. Shaw*, held that principles of strict construction governing interpretation of waivers of sovereign immunity controlled whether § 114 applied retroactively. While the court recognized that § 114 was an express waiver of sovereign immunity in response to *Shaw*, it held that in order for that waiver to apply to pre-Act interest, Congress must include an additional and now third waiver of sovereign immunity, expressly permitting retroactive application. In doing so, however, the court seemed to invite this Court to review this question because other Courts of Appeals had disagreed with the D.C. Circuit's method of analysis:

> Despite the Supreme Court's reaffirmation in *Ruckleshaus* [*v. Sierra Club*, 463 U.S. 680 (1983)] and in *Shaw* that waivers of sovereign immunity must be construed narrowly, there remains considerable confusion about the relationship between that special rule and the principles governing the retroactivity of statutes in general. In addition to the district court in this case, the Fourth, Eighth, and Tenth Circuits have considered whether a waiver of sovereign immunity is retroactive as though the question were to be answered in part by reference to the principles in *Bradley* and *Landgraf*.

78 F.3d at 654 (citing *Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995); *Huey v. Sullivan*, 971 F.2d 1362, 1365-66 (8th Cir. 1992); *Edwards v. Lujan*, 40 F.3d 1152, 1153-54 & n.1 (10th Cir. 1994)); App. 17a. Nevertheless, the court concluded that "the rule of strict construction displaces the *Bradley* analysis when the question is whether a waiver of sovereign immunity is to be applied retroactively." 78 F.3d at 654; App. 18a.

Applying its new rule that eliminates any consideration of the *Landgraf* retroactivity principles with respect to statutes waiving sovereign immunity, the court refused to

apply § 114's express waiver of sovereign immunity, permitting interest on attorneys' fees awarded against the government to compensate for delayed payment, to pre-Act delay. 78 F.3d at 654; App. 18a.

C. The Decision Denying Rehearing

Brown requested rehearing and suggested rehearing *in banc*, arguing that this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), dictated that once Congress has expressly waived sovereign immunity, a court should resort to ordinary principles of statutory construction, including retroactivity principles set forth in *Landgraf*, to determine the proper temporal duration of the waiver.

On petition for rehearing, Brown pointed out that the Court's reasoning in *Irwin* mirrored his argument that, where Congress provides an "unequivocally expressed" waiver of federal sovereign immunity, traditional rules of statutory construction applicable in suits against private parties should also apply in suits against the United States. Brown asserted that the rule of strict construction of waivers of sovereign immunity does not deprive a court of its traditional tools of interpreting statutes. Once an express and unequivocal waiver is established, the application of a traditional rule of statutory construction, such as equitable tolling, "amounts to little, if any, broadening of the congressional waiver." *Id.* at 95.

The Court of Appeals rejected Brown's argument that *Irwin* requires courts to apply *both* sovereign immunity and retroactivity analysis in sequence and denied Brown's petition for rehearing and suggestion for rehearing *in banc*. App. 32a-33a.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

Although the immediate question presented by this case is narrow, i.e. whether § 114(2) may be applied retroactively against the federal government, it raises important questions regarding the proper role of sovereign immunity as an obstacle to suit against the federal government. The basic issue presented here is whether, even after an express congressional waiver of sovereign immunity, that doctrine should prevent a court from applying the same rules of statutory construction to statutes authorizing suit against the federal government as it would apply in construing statutes that authorize suit against private parties. This question is potentially raised each and every time Congress consents to suit by legislation.

The D.C. Circuit's decision is the first and only decision to establish new constraints on congressional waivers of sovereign immunity. The decision requires that, where Congress enacts legislation that unequivocally waives sovereign immunity, for that legislation to apply to conduct occurring before enactment, Congress must additionally provide a clear and unequivocal statement of intent regarding retroactivity. This requirement that a congressional waiver of sovereign immunity expressly authorize retroactive application of the waiver applies different "rules of the game" to suits against the federal government than it does to legislation affecting only private parties. This additional requirement disregards the fact that the fairness concerns underlying retroactivity principles, when applied to legislation affecting private parties, are not implicated where the federal government itself consents to suit.

This case invites the Court to determine the proper relationship of the doctrine of sovereign immunity with *Landgraf* retroactivity principles. According to the Court of Appeals, the doctrine of sovereign immunity serves as a barrier to claims against the federal government not only

in the initial determination of whether the government has consented to suit, but also in each conceivable subsequent inquiry into the proper scope and/or duration of that consent. This Court's sovereign immunity jurisprudence dictates, however, that determinations of the *duration* of an express waiver of sovereign immunity are governed by ordinary tools of statutory construction. By ignoring these tools, the D.C. Circuit's decision creates an unnecessary conflict between this Court's sovereign immunity and retroactivity rules. This conflict has ramifications far beyond the result in this case or the application of this particular statute. Accordingly, review by this Court is necessary to resolve the conflict between these rules.

II. THE D.C. CIRCUIT'S DECISION DISREGARDS NORMAL RULES OF STATUTORY CONSTRUCTION WHERE THE FEDERAL GOVERNMENT CONSENTS TO SUIT

By enacting Section 114 of the Civil Rights Act of 1991, Congress unquestionably waived the federal government's sovereign immunity from several claims, including interest on attorneys' fees. *See* 42 U.S.C. § 2000e-16(d); *see also* H.R. REP. No. 40, *supra*, at 87. What remains at issue is whether that waiver of sovereign immunity encompasses retroactive application of Section 114, where traditional Supreme Court retroactivity analysis otherwise would permit such application.

In considering this question, the D.C. Circuit determined that a new retroactivity rule was required with respect to legislation affecting the liabilities of the United States. The court required that, in order to apply legislation affecting federal obligations to pre-enactment time and activities, Congress must not only expressly provide for the initial waiver of sovereign immunity but must also expressly state that the waiver be retroactive. *Brown*, 78 F.3d at 652; App. 12a. If the legislation is silent as to its retroactive application, as is § 114, then according to the D.C. Circuit, without using the statutory construc-

tion and retroactivity principles announced in *Landgraf*, the statute may not be given retroactive application.

By adopting this additional "express waiver" requirement, the D.C. Circuit held that the ordinary retroactivity rules and other rules of statutory construction applicable to legislation affecting private parties, *see Landgraf*, 511 U.S. 244, 114 S. Ct. 1483; *Bradley*, 416 U.S. 696, do not apply equally to suits against the United States. An examination of those rules demonstrates that the court's decision places an undue burden on parties suing the United States and ignores the background against which Congress legislates waivers of sovereign immunity and this specific waiver which was enacted directly in response to this Court's *Shaw* decision.

A. The D.C. Circuit's Decision Erroneously Declined to Apply the *Landgraf* Retroactivity Rule

This Court's most recent and definitive explanation of its retroactivity principles arose in *Landgraf*. At issue in *Landgraf* was whether other provisions of the Civil Rights Act of 1991, those that created a right to recover compensatory and punitive damages for certain violations of Title VII, could apply to cases pending when the statute was enacted. *Landgraf*, 114 S. Ct. at 1488. In deciding that these provisions could not apply to pending cases, the Court sought to reconcile two seemingly conflicting retroactivity principles: (1) the premise that a court must " 'apply the law in effect at the time it renders its decision' " *Id.* at 1496 (quoting *Bradley*, 416 U.S. 696, 711); and (2) the axiom that retroactivity is not favored in the law and that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* (quoting *Bowen*, 488 U.S. at 208).

In resolving that apparent tension, the Court stated its unwillingness to give "retroactive effect to statutes burdening *private rights* unless Congress ha[s] made clear its intent." *Id.* at 1499 (emhpasis added). Nevertheless,

the Court determined that there were certain categories of statutes that could be applied to pre-enactmnt conduct even where Congress had not stated its intention clearly. First, certain changes in procedural rules may be applied to suits arising before their enactment without raising retroactivity concerns. *Id.* at 1502. The second category, applicable here, are those matters, such as the attorney's fee determinations at issue in *Bradley*, which are " 'collateral to the main cause of action' " and " 'uniquely separable from the cause of action to be proved at trial.' " *Id.* at 1503 (quoting *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-52 (1982) and citing *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978)). In each of these classes of cases, application of a statute to preenactment conduct does not impose an "additional or unforeseeable obligation" to the affected party. *Id.* (citation omitted).

Thus, in cases involving only private parties, a lack of express guidance from Congress on the issue of retroactivity does not end the inquiry. *Id.* at 1505. Where Congress has not expressly dictated retroactivity, the "court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If not, a statute should be applied to cases pending at the time of its enactment.

The D.C. Circuit's opinion dictates that this inquiry is irrelevant in cases involving the federal government. The federal government/private party dichotomy established by this case could lead to the bizarre result that the same statute is interpreted and applied differently depending upon the identity of the defendant. That statute, 42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including ex-

> pert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Under this and other provisions of Title VII, prejudgment interest to compensate for delayed payment is "an element of complete compensation." *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987)).

Given these rules, in cases involving purely private parties, the determination of whether interest on attorneys' fees can be applied to pre-enactment conduct is governed by *Landgraf* and *Bradley*. Under that analysis, *Landgraf* dictates that § 2000e-5(k) could be applied to pre-enactment conduct because interest on attorneys' fees, like the attorneys' fees it modifies, is merely "a collateral issue." *See* App. 24a. Thus, where a private party is the defendant, § 2000e-5(k) would authorize interest on attorneys' fees incurred before enactment of the legislation.

According to the D.C. Circuit, however, where the federal government is the defendant, not only should § 2000e-5(k), as amended by 42 U.S.C. § 2000e-16(d), not be applied to allow pre-enactment interest, but the determination to refuse to apply it to pending cases is reached employing an entirely different set of ground rules. In cases against private parties, the statute may be applied to pre-enactment conduct in the absence of congressional authorization if it is deemed to affect collateral matters, *see Landgraf*, 114 S. Ct. at 1503. Under the D.C. Circuit's rule, the very same statute shall *not* be applied to pre-enactment conduct involving the federal government. Moreover, the D.C. Circuit concluded the *Landgraf* analysis is entirely irrelevant to that inquiry.

The D.C. Circuit's express retroactive waiver requirement ignores this Court's rationale for its rule in *Landgraf*. The *Landgraf* presumption is grounded in notions of fundamental fairness. *Id.* at 1500. "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new

burdens on persons after the fact." *Id.* The Court was primarily concerned with imposing unfair burdens on private parties and the potential unpredictability of a different rule. *Id.* at 1500 & n.25. Requiring clear intent, the Court reasoned, "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 1501.

The D.C. Circuit rule disregards the fundamental fairness concerns underlying the *Landgraf* rule.[7] Where the federal government has expressly consented to suit, the application of the waiver of sovereign immunity to pre-enactment conduct does not implicate these fairness concerns. Where the body that sets the rules decides to subject itself to suit, there is little concern for claims of notice and unfair surprise, as one court that considered the issue noted:

> [F]undamentally, the government is not a private individual, and principles of fairness that require notice and a right to be heard before subjecting private parties to retroactive liability do not obtain against the government. That is the clear import of Supreme Court rulings regarding retroactivity dating to the inception of the nation. *See, e.g., Bradley*, 416 U.S. at 724 (allowing retroactive award of attorney's fees in case against local school district); *Schooner Peggy*, 5 U.S. (1 Cranch) [103,] 110, 2 L. Ed. 49 [(1801)] (urging no retroactive application of laws in cases between *private* parties).

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[7] Moreover, the decision changes the default rules against which Congress legislates when it enacts legislation authorizing awards of attorneys' fees or related matters. When Congress enacts a statute that affects collateral matters, such as interest, it does so with an understanding that such a statute will be applied to pending cases. *See Landgraf*, 114 S. Ct. 1503-05. Thus, under *Landgraf*, Congress need not expressly state that this sort of legislation should be applied to pending cases. The D.C. Circuit rule, by contrast, requires a clear expression of congressional intent that the rule apply retroactively to allow application to pre-enactment conduct or activities.

Lockley v. Chao, 812 F. Supp. 246, 255 (D.D.C. 1993) (emphasis in original). *See also Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc.*, 887 F.2d 354, 356 (1st Cir. 1989) ("[I]f the party against whom the statute is to be applied is a public party, then the 'struggle' against the so-called retroactive application is not as hard."); *City of Great Falls v. United States Dep't of Labor*, 673 F.2d 1065, 1068 (9th Cir. 1982) ("[T]he Supreme Court has distinguished litigation involving . . . parties who are public entities, from private cases between individuals. . . . The Secretary of Labor and City of Great Falls are public entities, and this favors [retroactive] application of the new law."). Rather than counsel against application of congressional waiver of sovereign immunity to pending cases, then, the rationale underlying the *Landgraf* retroactivity principles actually supports such an application. Moreover, the need for uniformity in application of the statute authorizing interest on attorneys' fees further mandates that the *Landgraf* principles apply here.

The rule adopted by the D.C. Circuit wrongfully disregards long-standing principles of retroactivity established by this Court. Despite the fact that this case involves the narrow issue of interest on attorneys' fees against the federal government, the impact of the decision could be substantial. Each and every time the federal government waives its sovereign immunity from suit,[8] the D.C. Circuit decision directs courts to ignore its normal rules of construction regarding retroactive application of the waiver and look only for a clear expression of congressional in-

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[8] In addition to provisions of the Civil Rights Act of 1991, Congress has waived its sovereign immunity from suit in a broad range of cases. *See, e.g.*, 28 U.S.C. § 1346 (1994) (Federal Tort Claims Act); 11 U.S.C. § 106 (1994) (authorizing monetary damages against United States under Bankruptcy Act); 28 U.S.C. § 1505 (1994) (Indian Tucker Act); 28 U.S.C. § 2411 (1994) (expressly authorizing interest against the United States in tax refund cases).

tent that the new legislation be applied retroactively.[9] This case presents this Court the opportunity to clarify the applicability of the *Landgraf* retroactivity rules to legislation affecting the liabilities of the federal government, to provide for uniform application of those rules regardless of the parties to the suit, and to promote the fundamental fairness concerns underlying the *Landgraf* principles.

B. The D.C. Circuit's Decision Improperly Applies the Strict Construction Rule to a Determination of the Proper Duration of the Waiver

The D.C. Circuit reasoned that § 114's waiver of sovereign immunity should be strictly construed, thereby favoring one of the several competing rules of construction that this Court applies to statutory waivers.[10] The court

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[9] Two express waivers of sovereign immunity are enough. Congress first waived sovereign immunity for claims of attorneys' fees against the federal government in 42 U.S.C. § 2000e-5(k), which provides that "the United States shall be liable for costs [including attorneys' fees] the same as a private person." In 1986, the Court in *Shaw*, a five-four decision, held that although § 2000e-5(k) provided an express waiver of sovereign immunity for purposes of awarding attorneys' fees against the U.S., it did not provide a second express waiver of interest on attorneys' fees to compensate for delay in payment. *Shaw*, 478 U.S. at 319. That waiver, which *Shaw* found wanting, was supplied by Congress in § 114 of the 1991 Act, 42 U.S.C. § 2000e-16(d). The D.C. Circuit is now the first and only court to require yet a third waiver of sovereign immunity on the same topic expressly permitting interest to compensate for delayed payment of attorneys' fees for the period prior to the Act.

[10] *Compare Library of Congress v. Shaw*, 478 U.S. at 318 ("[W]e must construe waivers strictly in favor of the sovereign . . . and not enlarge the waiver 'beyond what the language requires.'") (citations omitted) *with United States v. Shaw*, 309 U.S. 495, 501 (1940) ("When authority is given, it is to be liberally construed."); *Block v. Neal*, 460 U.S. 289, 298 (1982) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") (citations

reasoned that the principle of strict construction applies not only to the determination of whether the sovereign has consented to suit but also to the determination of the date on which that consent took effect. *Brown*, 78 F.3d at 650; App. 9a. In doing so, the D.C. Circuit misapplied the rule of strict construction. Where the question is the proper *duration* of a waiver of sovereign immunity, the rule of strict construction does not require a court to disregard normal tools of statutory construction. In fact, this Court's decisions require a court to apply those rules to the determination.

It is undisputed that, in undertaking the threshold determination of *whether* Congress has consented to suit, a court must strictly construe a statute in favor of the sovereign. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992). Thus, a waiver of the federal government's sovereign immunity must be unequivocally expressed in the statutory text and will not be implied. *Lane v. Pena*, 116 S. Ct. 2092, 2096 (1996). In the instant case, § 114 clearly and unequivocally provides this waiver for interest on awards of attorneys' fees against the government. *See* H.R. REP. No. 40, *supra*, at 87.

Equally undisputed is the principle that a waiver of sovereign immunity will be strictly construed, in terms of its breadth, in favor of the sovereign. *Lane*, 116 S. Ct. at 2096. Thus, for instance, where the text of a statute waiving sovereign immunity is ambiguous with respect to the range of activity covered by the waiver, any doubt is resolved in favor of the government. *Id.*; *see also Ardestani v. INS*, 502 U.S. 129, 137 (1991) (refusing to expand language of waiver of sovereign immunity for claims of attorneys' fees to deportation proceedings not specified in statute).

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omitted) *and Smith v. United States*, 507 U.S. 197, 203 (1993) ("[W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended . . . .").

The application of the strict construction rule to determine the proper breadth of a waiver does not mean that issues regarding the *duration* of the waiver should always be resolved in favor of the federal government. *See Irwin*, 498 U.S. at 95. In *Irwin*, this Court concluded that the doctrine of equitable tolling applied to a statute of limitations governing suits against the United States in the same manner that it would apply to statutes of limitations governing suits against private parties. Petitioner Irwin argued that the doctrine of equitable tolling should preserve his late-filed claim of wrongful termination under Title VII from the lapse of the 30-day statute of limitations applicable to claims against the federal government because his attorney was out of the country when a final notice had been delivered to his office. *Id.* at 91-92.

In considering Irwin's claim, this Court noted that the statute of limitations governing plaintiff's cause of action "is a condition to its waiver of sovereign immunity and thus must be strictly construed." *Id.* at 94 (citing *Library of Congress v. Shaw*, 478 U.S. 310 (1986)). Nonetheless, the Court concluded that the doctrine of "equitable tolling," which traditionally applied to lawsuits between private litigants, *id.* at 95, should also apply to lawsuits against the United States:

> A waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.

Id. (citations omitted). Thus, the Court adopted the "general rule" that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court concluded by noting,

> Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.

Id. at 96.

Irwin counsels that, while the strict construction rule governs inquiries into the breadth of a waiver of sovereign immunity, questions regarding the proper duration of the waiver are not to be construed automatically in favor of the sovereign. Instead, the same principles of statutory construction should govern the inquiry in cases involving both the federal government and private parties. Despite the Court of Appeals' conclusion to the contrary, then, application of *Landgraf* retroactivity principles to legislation affecting the obligations of the United States is not foreclosed by the rule of strict construction. Rather, because it is a question affecting the proper timing of a waiver of sovereign immunity, *Irwin* dictates that "no more favorable" a rule of construction "may be employed against the Government than is employed in suits between private litigants." *Id.* at 96.

III. THE D.C. CIRCUIT'S DECISION THAT THIS COURT'S *LANDGRAF* RETROACTIVITY ANALYSIS DOES NOT APPLY TO CASES INVOLVING THE FEDERAL GOVERNMENT IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS WHICH APPLY *LANDGRAF* EQUALLY TO THE FEDERAL GOVERNMENT

In *Brown*, the D.C. Circuit held that this Court's retroactivity analysis in *Landgraf* does not apply to cases involving the federal government. Other circuits have held that it does. The D.C. Circuit recognized this conflict when it noted "considerable confusion about the relationship between [the rule of strict construction of waivers] and the principles governing the retroactivity of statutes in general." *Brown*, 78 F.3d at 654; App. 17a.

The D.C. Circuit is the only circuit to conclude that legislation affecting the obligations of the federal government is not subject to *Landgraf* analysis. Several courts, on the other hand, have reasoned that *Landgraf* applies equally to the federal government as it does to private parties. In *Edwards v. Lujan*, 40 F.3d 1152, 1154 (10th Cir. 1994), *cert. denied*, 116 S. Ct. 417 (1996), the Tenth Circuit held that the presumption against retroactive application reaffirmed in *Landgraf* applies with equal force to § 114's authorization of interest on back pay awards, *id.* at 1154 n.1, but did so without reference to principles of sovereign immunity. Thus, the case suggests that the same retroactivity principles applicable to private parties should be applied to legislation affecting the federal government. Similarly, in *Woolf v. Bowles*, 57 F.3d 407 (4th Cir. 1995), the Fourth Circuit analyzed the issue of whether § 114 authorizes interest on back pay awards against the federal government in pending cases, concluding that it does not. *Id.* at 410. In reaching that conclusion, however, the court analyzed the issue primarily under the *Landgraf* rule. The Court reasoned that section 114 would "impose an important new legal burden on the federal government," *id.*, referring only elliptically to the strict construction rule. *See also Huey v. Sullivan*, 971 F.2d 1362, 1365-66 (8th Cir. 1992) (utilizing *Landgraf* analysis), *cert. denied*, 114 S. Ct. 1642 (1994).

Some courts have decided that sovereign immunity doctrine does not bar retroactive application of certain statutes to the United States. The United States District Court for the Northern District of Illinois noted that, because § 114 waived sovereign immunity, the analysis in *Landgraf*, and not the rule of strict construction, was the appropriate analysis. *See Doll v. Brown*, No. 93 C 4410, 1995 U.S. Dist. LEXIS 14237, at **3-9 (N.D. Ill. Sept. 28, 1995), *aff'd in part and rev'd in part on other grounds*, 75 F.3d 1200, 1207 (1996).

Other courts addressing the issue before *Landgraf* also declined to displace retroactivity analysis with that of sovereign immunity. *See Berman v. Schweiker*, 713 F.2d 1290, 1300-01 (7th Cir. 1983) (finding, however, in context of Equal Access to Justice Act, explicit waiver of immunity); *Rawlings v. Heckler*, 725 F.2d 1192, 1194 (9th Cir. 1984) (explaining that sovereign immunity issues did not affect basic retroactivity analysis); *Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir. 1978) (applying retroactivity analysis against the government after examining in depth sovereign immunity doctrine in context of the Administrative Procedure Act).

Furthermore, the United States itself does not agree with the D.C. Circuit that this Court's decision in *Landgraf* should be ignored in determining whether § 114's express waiver of sovereign immunity applies with respect to award of pre-Act interest on attorneys' fees. In its brief and at oral argument below, although opposing pre-Act interest, the United States argued that the proper analysis of the interest and sovereign immunity issues was *Landgraf*'s collateral/non-collateral issues framework. In fact, the United States acknowledged that another section of the 1991 Act, 42 U.S.C. § 2000e-5(k), which permits the award of expert witness fees against the United States, applies "retroactively" to fees incurred before the passage of the Act because such fees are "collateral" under *Landgraf*. However, if the D.C. Circuit's analysis in *Brown* were applied, because the 1991 Act's express waiver of sovereign immunity with respect to expert witness fees does not also expressly state that this waiver is retroactive, then such fees would not be recoverable.

This "considerable confusion" recognized by the D.C. Circuit does not present merely a theoretical question regarding the proper intersection of the doctrines of sovereign immunity and retroactivity. Instead, the varying approaches employed by the circuits will likely lead to

equally varying conclusions among the circuits. For instance, under the analysis employed by the Tenth Circuit in *Edwards v. Lujan*, § 114's authorization of interest on attorneys' fees would be applicable to pending cases. Unlike back pay awards, which are compensatory in nature, attorneys' fees are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *Landgraf*, 114 S. Ct. at 1503. Thus, unlike interest on back pay, which adds to a compensatory award, interest on those attorneys' fees would similarly be uniquely separable from the main cause of action and applicable to pending cases.

CONCLUSION

This case raises an important issue regarding a conflict of the doctrine of sovereign immunity and the *Landgraf* retroactivity principles, which is likely to recur in this and other contexts if left uncorrected and the doctrine unclarified. Given the interest in fairness and uniform application of statutes, the D.C. Circuit's determination that *Landgraf* does not apply to legislation affecting the federal government improperly resolves the conflict. This Court should accept the invitation of the Court of Appeals to clarify the intersection between these potentially conflicting doctrines and thus grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-5026, 95-5048

JAMES BROWN,
Appellee/Cross-Appellant,

v.

SECRETARY OF THE ARMY,
Appellant/Cross-Appellee.

Argued Nov. 15, 1995

Decided March 12, 1996

Before: EDWARDS, Chief Judge, GINSBURG and HENDERSON, Circuit Judges.

GINSBURG, Circuit Judge:

In this litigation of Dickensian protraction, James E. Brown, a civilian employee of the U.S. Army, alleged and for the most part established that he was the victim of repeated employment discrimination based upon his race. In the last chapter Brown prevailed on the merits of a Title VII suit alleging that the Army discriminated against him in refusing to hire him into a GS-9 position; he received an award of back pay, placement in an appropriate position, and a permanent injunction against the Army's

engaging in any further discrimination against him. *See Brown v. Marsh*, 713 F.Supp. 20 (D.D.C.1989), *aff'd. sub nom. Brown v. Secretary of the Army*, 918 F.2d 214 (D.C.Cir. 1990). Today we write the epilogue to this nearly 20-year saga.

After resolving the merits of Brown's Title VII claim, the district court awarded Brown attorney's fees and costs pursuant to 42 U.S.C. § 2000e-5(k). The district court later awarded interest on those fees and costs, invoking the authority of § 114(2) of the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1079 (codified as an amendment to 42 U.S.C. § 2000e-16(d)). The Government now appeals the award of interest on the ground that the 1991 Act, which became effective while the case was pending, cannot be applied retroactively against the United States. In a cross-appeal Brown challenges the district court's use of the rate of interest on Treasury Bills, rather than the prime rate, to determine the amount of prejudgment interest he is due. As it turns out, we need not reach this issue.

We hold that sovereign immunity bars application of the interest provision retroactively to this case. A waiver of sovereign immunity must be strictly construed; it may not be applied retroactively unless the Congress clearly so intended. Wanting direction from the legislature that § 114(2) is to be applied retroactively, we vacate the district court's award of interest on Brown's attorney's fees.

I. Background

Brown's petition for attorney's fees, expenses, and interest was pending when the Congress passed the Civil Rights Act of 1991. By the terms of that Act, each provision was to "take effect upon enactment" (that is, on November 21, 1991) unless otherwise specifically provided. § 402(a), Pub.L. 102-166, 105 Stat. 1071, 1099 (1991).

In § 114(2) of the Act the Congress amended the portion of Title VII that applies to federal employees so as to provide that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." 42 U.S.C. § 2000e-16(d). This provision was enacted in response to the decision in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), in which the Supreme Court had held that a party prevailing in a Title VII suit against the Government was not entitled to interest on attorney's fees because the provision permitting the award of the attorney's fees did not expressly waive sovereign immunity from such liability.

The district court awarded Brown attorney's fees and other expenses in August 1992, but it reserved the issue of interest on the fee award pending a final decision on the retroactivity of the 1991 Act in *Gersman v. Group Health Assn., Inc.*, 975 F.2d 886 (D.C.Cir.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Following our decision in *Gersman* and the Supreme Court's subsequent decision in *Landgraf v. USI Film Products*, —— U.S. ——, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), Brown renewed his request for interest on his award of attorney's fees. In *Landgraf* the Supreme Court reaffirmed its earlier holding in *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), that a court should generally apply the version of a statute, including any amendment, that is in effect at the time of its decision. Because the compensatory and punitive damage provisions of the 1991 Act would attach new substantive legal burdens to past conduct, however, the Court held that those provisions could not be applied retroactively. —— U.S. at ——, 114 S.Ct. at 1506.

Relying primarily upon *Landgraf*, the district court held that § 114(2) does apply retroactively to this case, entitling Brown to interest on his attorney's fees and expenses. *See Brown v. Marsh*, 868 F.Supp. 15 (D.D.C.

1994). The court reasoned that § 114(2) does not change any party's substantive rights because it "merely extends" to the Government the liability for interest on attorney's fees that private defendants already faced. *Id.* at 18. Moreover, the court said, the interest provision must be deemed collateral to the parties' substantive rights because the award of attorney's fees is itself "uniquely separable from the cause of action to be proved at trial." *Id.*

On appeal the Government argues, inter alia, that the interest provision of the 1991 Act is a waiver of sovereign immunity and therefore must be construed narrowly; because neither the text of the statute nor its legislative history indicates that the Congress intended it to apply retroactively, the provision cannot apply in this case. Brown retorts that a waiver of sovereign immunity must be construed narrowly only with respect to its scope; whether the waiver applies retroactively is a separate question that may be answered with reference to the principles of statutory construction laid down in *Bradley* and *Landgraf*.

The Government's sovereign immunity argument was raised for the first time on appeal. As Brown must concede, however, that is not a bar to our considering it. Whether the United States has consented to be sued "is the sort of jurisdictional question which may be raised at any time, either by the parties or by the court sua sponte." *Mellos v. Brownell,* 250 F.2d 35, 36 (D.C.Cir. 1957); *see United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 514, 60 S.Ct. 653, 657, 84 L.Ed. 894 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void").

Whether § 114(2) applies retroactively to this case is a question of law that was resolved by the district court upon a motion for summary judgment. Accordingly, we review the district court's decision *de novo. See Shields v. Eli Lilly & Co.,* 895 F.2d 1463, 1465-66 (D.C.Cir.1990).

II. Analysis

Nothing in either the text or the legislative history of the 1991 Civil Rights Act indicates that the Congress intended the entire Act to apply retroactively. *Landgraf*, —— U.S. at ——-——, 114 S.Ct. at 1493-96; *see also Gersman*, 975 F.2d at 888-92. Two provisions were explicitly made prospective only; the rest of the Act was to "take effect upon enactment." § 402(a), Pub.L. No. 102-166, 105 Stat. 1071, 1099 (1991). Absent any direction from the Congress, whether a particular provision of the Act applies retroactively to a case pending when the statute was enacted—that is, to a case arising from conduct that occurred before it was enacted—is a matter of statutory construction. *Cf. Landgraf*, —— U.S. at ——, 114 S.Ct. at 1496. The crucial issue in this case is which principle of statutory construction—the principle of *Shaw* and *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86, 103 S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983), applicable to waivers of sovereign immunity, or the principles of *Bradley* and *Landgraf*, which apply to retroactivity in general—should guide our interpretation of § 114(2).

A. Retroactivity under *Bradley* and *Landgraf*

As a general matter, in order to determine whether a statute has retroactive effect, the court first "must ask whether the new provision attached new legal consequences to events completed before its enactment." *Landgraf*, —— U.S. at ——, 114 S.Ct. at 1499. If not, then the court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016; *see United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801); *Gersman*, 975 F.2d at 893.

The principle that a court is to apply the law as it is at the time of decision was most fully explicated by the

Supreme Court in *Bradley*. The district court in that case, relying upon general equitable principles, had awarded attorney's fees and costs to the prevailing plaintiffs in a desegregation suit against a public school board. While the case was before the Fourth Circuit, the Congress enacted a statute expressly authorizing such awards. After vacating the district court's equitable award, the court of appeals held that the new statute could not be applied to attorney's fees for services rendered before the effective date of the statute. The Supreme Court reversed, holding that the plaintiffs were entitled to attorney's fees under the statute on the principle that, barring manifest injustice or statutory direction to the contrary, "a court is to apply the law in effect at the time it renders its decision." 416 U.S. at 711, 94 S.Ct. at 2016.

Twenty-five years later, in *Landgraf*, the Court made clear that the principle of *Bradley* is applicable only to nonsubstantive matters; it does not displace "the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." —— U.S. at ——, 114 S.Ct. at 1504. The new statute at issue in *Bradley*, the Court noted, affected only attorney's fee awards, which are "collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial," *id.* at ——, 114 S.Ct. at 1503; the statute did not impose a new substantive liability for pre-enactment conduct. From this distinction one might well infer that a statute authorizing the award of interest on attorney's fees would also fall within the play-it-as-it-lies principle of *Bradley*.

The statute at issue in *Bradley*, however, was not a waiver of the sovereign immunity of the United States; rather, it was an explicit statutory authorization for the award of attorney's fees in desegregation cases—a type of award that was available as an equitable matter before the enactment of the statute and was not barred by Eleventh Amendment immunity. 416 U.S. at 721, 94 S.Ct.

at 2021. As a result, the Supreme Court in *Bradley* had no occasion to advert to the special principle of statutory construction that it had previously made applicable to waivers of sovereign immunity. In this case, however, we must consult that principle.

B. Sovereign Immunity

A statute waiving the sovereign immunity of the United States must be construed strictly. *Shaw*, 478 U.S. at 318, 106 S.Ct. at 2963; *Ruckelshaus*, 463 U.S. at 685-86, 103 S.Ct. at 3277-78. Indeed, such a waiver is to be read no more broadly than its terms require. As the Supreme Court has more than once said with specific reference to a statute arguably waiving the immunity of the United States from the assessment of interest:

> There can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Shaw, 478 U.S. at 318, 106 S.Ct. at 2963 (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1947)). This rule of strict construction controls our analysis both in determining whether the United States has consented to be sued and in defining the scope of that consent. *See Nichols v. Pierce*, 740 F.2d 1249, 1257 (D.C.Cir.1984) ("The policies inherent in the rule requiring strict construction of waivers of sovereign immunity strongly suggest that any doubts about the scope of a waiver be resolved in favor of the narrower governmental liability"); *see also In re Nofziger*, 938 F.2d 1397, 1403 (D.C.Cir. 1991) (refusing to interpret waiver more broadly than

terms required and noting such waivers not subject to equitable expansion).

The courts have marshaled both historical and practical considerations in support of the doctrine of sovereign immunity and its appendant rule that waivers are to be construed narrowly. *See generally United States v. Lee*, 106 U.S. (16 Otto) 196, 27 L.Ed. 171 (1882). From an historical perspective, the doctrine rests upon the notion that "it would contradict the sovereignty of the king to allow him to be sued as of right in his own courts." *Hunt v. United States*, 636 F.2d 580, 583 (D.C.Cir. 1980). The sovereignty of the king has been succeeded by the sovereignty of the people, acting through their elected delegates, but the rule of strict construction still serves to insure that courts defer to the precise terms of their consent. In addition, as a practical matter:

> The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. . . . [The United States] cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.

The Siren, 74 U.S. (7 Wall.) 152, 154, 19 L.Ed. 129 (1868). The rule of strict construction is thus arguably necessary, as we once put it, to "protect[] the United States Treasury from potentially excessive liabilities which Congress did not anticipate." *Nichols*, 740 F.2d at 1255. While it may not be entirely clear why the Treasury of the United States is any more in need of protection from

"excessive liabilities" than is, say, General Motors, the rule of strict construction is itself clear. What is more, the rule is clearly understood to be the background against which the Congress acts when it waives sovereign immunity: we must presume that a Congress that intends to waive sovereign immunity is aware of the principles that will govern our reading of the waiver. Therefore, having said that we would take the legislature strictly at its word when it specifies whether and to what extent it waives sovereign immunity, we are bound to infer that it intended no more than it said.

C. Retroactivity of a Waiver of Sovereign Immunity

The present case poses the question: Does the rule of strict construction also govern our analysis of whether an undoubted waiver of sovereign immunity is to be given retroactive effect? Brown argues that the retroactivity of a waiver may be analyzed differently from other aspects of the scope of the waiver; once we have determined that the statute waives sovereign immunity from interest on attorney's fees, we may resolve the question of retroactivity with reference to the usual rules of statutory interpretation. In view of the rationale for the rule of strict construction, however, we can see no reason why it should not constrain us equally whether we plumb the depth or measure the breadth of a waiver. We run the same risk of imposing upon the public fisc an unanticipated and potentially excessive liability, whether we hold that a statute waives sovereign immunity from an element of damages not contemplated by the Congress or we apply the waiver over a period that the Congress did not envision. *See In re Jordan,* 745 F.2d 1574, 1576 (D.C.Cir. 1984) (holding attorney's fee amendment to Ethics Act not retroactive because "[w]aivers of sovereign immunity must be strictly construed. . . . [T]he fact that the amendment does not specifically exclude retroactive fee applications is of little importance to our construction of the

amendment"); *see also Woolf v. Bowles,* 57 F.3d 407, 410 (4th Cir.1995) ("*Shaw*'s reminder that waivers of interest immunity are to be strictly construed . . . provides further support for our conclusion [that under *Landgraf* § 114(2) of the 1991 Act cannot apply retroactively to authorize interest on back pay against the Government]"); *Huey v. Sullivan,* 971 F.2d 1362, 1365 (8th Cir.1992) (concluding that precursors to *Landgraf* bar retroactive application of § 114(2) in back pay cases, and noting that "the policy requiring that waivers of sovereign immunity be construed strictly in favor of the United States . . . makes a finding of no retroactivity even more compelling in this case"). But see *Campbell v. United States,* 809 F.2d 563, 577 (9th Cir.1987), discussed in Part II.C.2 below.

As they relate to the question whether a statute is retroactive, then, it would seem that the *Bradley* presumption and the rule of strict construction are antipodal. In the usual case—that is, the case in which no waiver of sovereign immunity is involved—*Bradley* requires the court to presume that the newly enacted provision is retroactive; only where manifest injustice would result, or where the Congress can be seen to have intended otherwise, is that presumption rebutted. In the special case, however, in which the newly enacted statute is a waiver of sovereign immunity, the rule of strict construction requires the opposite: the statute is to be construed no more broadly than is required by its terms.

We considered and rejected the application of *Bradley* to a case involving the waiver of sovereign immunity in *Nichols v. Pierce, supra.* That case concerned the waiver of immunity in the Equal Access to Justice Act for attorney's fees incurred by plaintiffs in cases "pending on, or commenced on or after" October 1, 1981. Pub.L.96-481, § 208, 94 Stat. 2321, 2330 (1980). The appellant had filed suit against the Government, and the substance of her claim had been fully litigated, long before that date.

The only aspect of the case still "pending" on October 1 was the plaintiff's appeal from the district court's order denying her the attorney's fees she sought under the Freedom of Information Act. We concluded that the EAJA did not apply to a case in which the only matter still pending concerned a petition for the award of attorney's fees. 740 F.2d at 1261. *Bradley* was "readily distinguishable": the United States was not the defendant in that case. *Id.* at 1258 (citing, inter alia, *Commissioners of Highways v. United States*, 684 F.2d 443, 443-45 (7th Cir.1982)); *accord Tongol v. Donovan*, 762 F.2d 727, 730-32 (9th Cir.1985) (following *Nichols*); *Commisioners of Highways*, 684 F.2d at 444 (reaching same result in case similar to *Nichols* and distinguishing *Bradley* on ground it "did not involve the issue of [the] sovereign immunity of the United States"); *Berman v. Schweiker*, 713 F.2d 1290, 1301 n. 28 (7th Cir.1983) ("Our observation in *Commissioners of Highways* that *Bradley* did not involve a sovereign immunity bar reflects a critical distinction between the two cases—one that required a different analysis of the retroactive fee issue . . ."); *Van Meter v. Barr*, 778 F.Supp. 83, 85-86 (D.D.C.1991); *cf. Edwards v. Lujan*, 40 F.3d 1152, 1153-54 & n. 1 (10th Cir.1994) (holding that § 114(2) does not apply retroactively to authorize interest on attorney's fees, based solely upon conclusory analogy to *Landgraf*). Because the Court in *Bradley* was not faced with a purported waiver of sovereign immunity, it interpreted the new statute broadly, without insisting upon the special rule requiring narrow construction of such a waiver. In this case as in *Nichols*, however, we must insist upon it.

We do well to remember that principles of statutory construction are not ends in themselves; they are the tools with which we discern the intent of a legislature that has not made its intent explicit. In this case, which must be viewed against the background of *Shaw*, the failure of the Congress to be explicit puts into stark relief the importance of applying the rule of strict construction to

each aspect of a waiver of sovereign immunity. Before the 1991 amendments, Title VII had provided simply that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs, and the [EEOC] and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k). This court held that because a court could award interest on the attorney's fee in a suit against a private employer, the just-quoted provision authorized the court equally in a case against the Government to award interest on the attorney's fee. The Supreme Court reversed, stating: "The statute, as well as its legislative history, contains no reference to interest. This congressional silence does not permit us to read the provision as the requisite waiver of the Government's immunity with respect to interest." 478 U.S. at 319, 106 S.Ct. at 2964. The Court reaffirmed the rule that waivers must be construed strictly in favor of the sovereign and emphasized that the "no-interest" rule—the historical rule that interest is a separate element of damages and may be recovered only against a party that has agreed to be liable therefor —provides "an added gloss of strictness" upon the rule of strict construction. *Id.* at 318, 106 S.Ct. at 2963; *see also Thompson v. Kennickell*, 797 F.2d 1015, 1017 (D.C.Cir. 1986) ("These principles of sovereign immunity take on added force when applied to claims of interest against the United States," citing "no-interest" rule). Shortly thereafter, the Congress responded to *Shaw* by adding to Title VII an express waiver of sovereign immunity from interest. Notwithstanding the Court's obvious intention to construe that waiver narrowly, however, the Congress said nothing to indicate that the provision should be applied retroactively. In these circumstances we cannot infer that the Congress anticipated a broader application of § 114(2) than is required by its terms.

1. Thompson v. Sawyer. Brown nonetheless contends that our own precedents require that we treat the question

of retroactivity by reference to the presumption laid out in *Bradley* and not as we treat other aspects of the scope of a waiver of sovereign immunity. In this connection Brown draws our attention to *Thompson v. Sawyer*, 678 F.2d 257 (D.C.Cir.1982), in which we held that certain statutory amendments making back pay and damages available to employees of the Government Printing Office could be applied retroactively to compensate employees for a period beginning before the effective date of the amendments. Indeed, quoting *Bradley*, we invoked the "basic rule" that "a court is to apply the law in effect at the time it renders its decision." 678 F.2d at 279. In an opinion by Judge Mikva before he said goodbye to footnotes, the court addressed the issue of sovereign immunity only in the margin, as follows:

> GPO contends that sovereign immunity insulates it from retrospective liability under both the Equal Pay Act and Title VII. Congress, however, waived sovereign immunity by authorizing suits against the federal government under the FLSA. *See United States v. Testan*, 424 U.S. 392 [96 S.Ct. 948, 47 L.Ed.2d 114] (1976). The question we face is whether Congress intended the statutory change, and hence the waiver, to have only prospective thrust.

Id. at 281 n. 23; *see also id.* at 289 n. 33.

In *Thompson* we were concerned with a rather narrow class of cases—those in which the conduct for which the Government is liable began before but continued beyond the effective date of the statute. *See Stoller v. Marsh*, 682 F.2d 971, 974 (D.C.Cir.1982) (citing *Thompson*). That is no doubt why, although we have often cited *Thompson*, it has never been to suggest in any way that a waiver of sovereign immunity may be applied retroactively if the Congress was silent upon that question. On the contrary, Judge Mikva later characterized *Thompson* as a case of the court following known congressional intent and holding "that the 1972 amendments . . . had simply extended

to federal employees a remedy for illegal discrimination, and that Congress had intended that remedy to be applied to the fullest extent." *McKenzie v. Sawyer,* 684 F.2d 62, 78 (D.C.Cir.1982); *cf. Cuneo v. Rumsfeld,* 553 F.2d 1360 (D.C.Cir.1977) (provision in FOIA authorizing awards of attorney's fees applied retroactively despite rule of strict construction because legislative history showed that Congress intended that existing body of law governing attorney's fees be used to determine whether award could be made against Government).

Moreover, after the Supreme Court had decided *Ruckelshaus* (about a year after our decision in *Thompson*), "reaffirming" that the rule of strict construction applies to waivers of sovereign immunity from attorney's fees and "cautioning courts against enlarging these waivers beyond the explicit statutory language," *Nichols,* 740 F.2d at 1255-56, we expressly relied upon the rule of strict construction in holding that a statute waiving sovereign immunity from attorney's fees could not be applied retroactively to cover fees incurred before the effective date of the statute because the Congress did not state or imply that it intended that result. *See In re Jordan,* 745 F.2d at 1576. We reached this holding without any suggestion that it was in tension with *Thompson.* We see no reason why *Thompson* should be of any more help to Brown today than it was to Hamilton Jordan in 1984.

2. *Hill v. United States.* Brown also relies upon *Hill v. United States,* 571 F.2d 1098, 1102 (1978), in which the Ninth Circuit held that § 702 of the Administrative Procedure Act applies retroactively to waive sovereign immunity from declaratory and affirmative relief arising out of conduct that occurred before the effective date of the 1976 amendments to the APA. The court in *Hill* analyzed the retroactivity of § 702 using the framework of *Bradley,* without reference to the rule of strict construction, that the provision was a waiver of sovereign immunity was considered only in the course of determining whether it

would be a manifest injustice to apply the statute retroactively. *Id.*

We note in this regard that the continued vitality of *Hill* as the law of the Ninth Circuit is very doubtful. The court adhered to *Hill* later the same year in *Rawlings v. Heckler*, 725 F.2d 1192, 1194-95 (9th Cir.1984) (holding attorney's fees incurred before effective date of EAJA recoverable in case pending on effective date, and rejecting Government's attempt to distinguish *Bradley* on sovereign immunity grounds). In the following year, however, the court limited *Rawlings* and distinguished it from a case raising the issue that we faced in *Nichols v. Pierce* —that is, whether a fee petition pending on the effective date of a statute authorizing an award of attorney's fees brings the case within the class of covered cases "pending on" the effective date. *See Tongol*, 762 F.2d at 730-32. The Ninth Circuit, following our holding and analysis in *Nichols*, distinguished *Bradley* because it did not involve a waiver of sovereign immunity and noted that *Nichols* "more closely reflect[ed] the approach mandated by latest teachings of the Supreme Court," namely the "principles of narrow construction." *Id.* at 732. Then, in a 1987 case involving the retroactive application of a statute that changed the index that determines (but did not necessarily raise) the rate of postjudgment interest payable by the Government, the court acknowledged the rule of strict construction in *Tongol* but then cited *Hill* and *Rawlings* with approval, stating that "[t]he principle of sovereign immunity does not require us to resolve all doubtful questions concerning the temporal applicability of a statute in the government's favor when the literal requirements of the statute are otherwise met." *Campbell*, 809 F.2d at 577. That case, however, was effectively overruled by the Supreme Court, which concluded, in a case against a private defendant in which sovereign immunity was not implicated at all, that the statute could not be applied retroactively to a judgment entered before the effective date of the statute. *See Kaiser Aluminum &*

Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990).

Finally, in considering whether to apply the provision at issue in this case to authorize interest on back pay in a case against the Government that was pending upon enactment of the statute, the Ninth Circuit discussed the retroactivity issue in *Bradley*-inspired terms without considering the rule of strict construction it had recognized in *Tongol* for cases against the sovereign *See Estate of Reynolds v. Martin*, 985 F.2d 470, 472-73 (9th Cir. 1993). Ultimately, however, the court concluded instead that the plain language of the 1991 Act indicates that the Congress intended that it be applied retroactively. *See id.* at 476. Inasmuch as the Supreme Court has since made clear that neither the language nor the legislative history shows an intent that the 1991 Act as a whole be applied retroactively, *see Landgraf*, —— U.S. at ——-——, 114 S.Ct. at 1493-96, it is unclear how the Ninth Circuit would now resolve the question whether § 114(2) in particular is retroactive. If it recalls the distinction it drew in *Tongol*—its last word on the subject apart from the decisions effectively overruled in *Kaiser Aluminum* or cast into doubt by *Landgraf*—then it will reach the same conclusion we do. *See also United States v. Matson Nav. Co. (The Louie III)*, 201 F.2d 610, 616 (9th Cir.1953) ("waiver of sovereign immunity creates a new cause of action which has no retroactive effect unless specifically granted"). In any event, the present state of the law on this issue in the Ninth Circuit is at best unclear and does not give us pause.

3. Other Cases. The remainder of the cases to which Brown refers are simply inapposite. In *Hutto v. Finney*, 437 U.S. 678, 693-98, 98 S.Ct. 2565, 2574-78, 57 L.Ed. 2d 522 (1978), the Supreme Court held that a statute authorizing fee-shifting in civil rights cases applied retroactively against the State of Arkansas, but only after concluding that the statute made fees part of the "costs"

awarded to a prevailing plaintiff, which had never been barred by the sovereign immunity of the States recognized in the Eleventh Amendment. In *Natural Resources Defense Council, Inc. v. EPA*, 703 F.2d 700 (3d Cir. 1983), the Third Circuit did not even mention sovereign immunity in concluding that the statute in question applied retroactively against the United States. And both the Seventh Circuit in *Adams v. Brinegar*, 521 F.2d 129 (7th Cir.1975), and this court in *Womack v. Lynn*, 504 F.2d 267 (D.C.Cir.1974), held that a statute authorizing judicial review of a federal employee's administrative claim of employment discrimination applied retroactively because the statute provided merely that the employee would have access to a judicial forum and did not create a new substantive liability in derogation of sovereign immunity. None of these cases supports the argument that we should resolve the question whether the waiver of sovereign immunity in this case may be applied retroactively by consulting the principle of *Bradley* rather than the rule of strict construction.

III. Conclusion

Despite the Supreme Court's reaffirmation in *Ruckelshaus* and in *Shaw* that waivers of sovereign immunity must be construed narrowly, there remains considerable confusion about the relationship between that special rule and the principles governing the retroactivity of statutes in general. In addition to the district court in this case, the Fourth, Eighth, and Tenth Circuits have considered whether a waiver of sovereign immunity is retroactive as though the question were to be answered in part by reference to the principles in *Bradley* and *Landgraf*. *See Woolf*, 57 F.3d at 410; *Huey*, 971 F.2d at 1365-66; *Edwards*, 40 F.3d at 1153-54 & n. 1. In this case we face yet again a party arguing that we should apply the analysis in *Bradley* to a case involving a waiver of sovereign immunity. Until the Supreme Court changes its position, however,

we believe that the rule of strict construction displaces the *Bradley* analysis when the question is whether a waiver of sovereign immunity is to be applied retroactively.

Section 114(2) of the 1991 Act waives sovereign immunity with respect to interest on attorney's fees awarded under Title VII. In the case at hand, the litigation on the merits of Brown's claims was completed and the attorney's fee incurred before the statute became effective. Therefore, to apply § 114(2) retroactively in this case would be to impose upon the United States a liability to which it has not explicitly consented. The order of the district court awarding interest on Brown's attorney's fees and expenses is accordingly

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 80-1169 (CRR)

JAMES E. BROWN,

Plaintiff,

v.

JOHN O. MARSH, JR., Secretary of the Army,

Defendant.

Nov. 21, 1994

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

INTRODUCTION

In 1991, Congress amended the Civil Rights Act of 1964 ("The 1964 Act"), as amended in March, 1972. 42 U.S.C. § 2000a *et seq.* The Civil Rights Act of 1991 ("The 1991 Act") provides in Section 114 that:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and *the same interest to compensate for delay in payment shall be available* as in cases involving nonpublic parties.

42 U.S.C. § 2000e-16(d) ("Section 114") (emphasis added). Section 114 entitles a prevailing party in a Title VII action to an award of interest on previously awarded attorney's fees and expenses.

The question presented in this case is whether the above statute, which provides for interest on attorney's fees and expenses, applies to a case that was pending at the time the statute was enacted.

Upon careful consideration of the pleadings, oral argument, and the applicable law, the Court holds that Section 114 applies to the case at bar, entitling the Plaintiff to interest on his attorney's fees and expenses. In addition, the Court holds that interest shall be calculated in accordance with the judgment rate of interest prescribed in 28 U.S.C. § 1961.

FACTS

On August 20, 1992, the Court awarded attorney's fees and expenses to the Plaintiff as a prevailing party in a Title VII action. However, the Court reserved the issue of whether interest on those fees is awardable pending resolution by the District of Columbia Circuit of the applicability of the Civil Rights Act of 1991 to pending cases.

In late 1994, the Plaintiff filed an application for interest on his attorney's fees in light of this Circuit's decision in *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898 (D.C.Cir.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994), and the Supreme Court's decision in *Landgraf v. USI Film Prods.*, —— U.S. ——, ——-——, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994).

In response, the Government agreed to pay the Plaintiff interest on his attorney's fees and expenses incurred after the enactment of Section 114 of the Civil Rights Act of 1991. However, the Government contended that the Plaintiff is not entitled to any interest on fees prior to the enactment of Section 114. According to the Government,

there is a presumption against the retroactive application of a statute whenever applying the statute would affect the parties' substantive rights. *See e.g., Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 471-72, 102 L.Ed.2d 493 (1988). The Government contends that the presumption against retroactivity applies in this case because awarding interest on attorney's fees is a compensatory damage award and, therefore, would affect their substantive rights. Nevertheless, even if the Plaintiff were entitled to interest, the Government argues, the appropriate rate of interest is the judgment rate of interest prescribed in 28 U.S.C. § 1961.

The Plaintiff, in response, contends that the presumption against retroactive application of a statute does not arise when the application of a statute is merely collateral. In such cases, a court must apply the law that exists at the time that it renders its decision. *See e.g., Bradley v. Richmond School Bd.,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). According to the Plaintiff, awarding interest on attorney's fees in a case that was pending when Section 114 was enacted is purely collateral and, therefore, does not affect the substantive rights of the parties. Consequently, the Plaintiff argues that he is entitled to interest on his attorney's fees and that the appropriate rate of interest is the prime rate.

Upon review of the pleadings, oral argument, and applicable law, the Court finds that Section 114 of the Act allowing for interest on attorney's fees does not affect the parties' substantive rights. Therefore, the presumption against retroactive application of a statute does not apply. Instead, the Court must apply the law that exists at the time it renders its decision. Since Section 114 is currently effective, the Court finds that the Plaintiff is entitled to an award of interest on his attorney's fees and costs. In addition, in view of the substantial case law applying the judgment rate of interest instead of the prime rate of interest to an award of attorney's fees, the appropriate

rate of interest is the judgment rate set forth in 28 U.S.C. § 1961.

DISCUSSION

I. *THE COURT FINDS THAT THE PLAINTIFF IS ENTITLED TO INTEREST ON HIS ATTORNEY'S FEES AND COSTS BECAUSE APPLYING SECTION 114 RETROACTIVELY ONLY AFFECTS THE COLLATERAL RIGHTS OF THE PARTIES.*

Section 114 of the Civil Rights Act of 1991 entitles a prevailing party to interest on attorney's fees from a Government party. 42 U.S.C. § 2000e-16(d) ("Section 114"). At the time that Section 114 took effect in November of 1991, the instant action was still pending before this Court.

To decide if Section 114 applies retroactively, the Court must first look to the language of the statute itself. *E.g., Planned Parenthood Fed'n of Am. v. Heckler,* 712 F.2d 650, 655 (D.C.Cir.1983) (citing *CPS v. GTE Sylvania, Inc.,* 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). However, since the statute is silent with respect to whether Section 114 applies retroactively or not, the Court must look to the relevant case law.

According to the case law, if applying a statute retroactively would affect the parties' substantive rights, then a presumption against retroactive application of a statute arises. *Landgraf v. USI Film Prods.,* —— U.S. ——, ——, ——, 114 S.Ct. 1483, 1499, 1502, 128 L.Ed.2d 229 (1994); *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 471-72, 102 L.Ed.2d 493 (1988); *Gersman v. Group Health Ass'n, Inc.,* 975 F.2d 886, 898 (D.C.Cir.1992), *cert. denied,* —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Based on that presumption, a statute will not be applied retroactively.

In contrast, if applying a statute retroactively would only affect the parties' collateral rights, then a court is to apply the law that exists at the time it renders its decisions. *Landgraf v. USI Film Prods.*, —— U.S. ——, ——-——, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994); *see Bradley v. Richmond School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 525-26, 21 L.Ed.2d 474 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed.49 (1801); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898-99 (D.C.Cir.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Accordingly, a statute that does not affect the substantive rights of the parties will be applied retroactively.

In applying the foregoing analysis to the case at bar, the Court must decide if awarding the Plaintiff interest on his attorney's fees affects the parties' substantive rights. For if the award of interest on attorney's fees affects a substantive right, the traditional presumption against retroactive application of a statute applies. Conversely, if the award of interest on attorney's fees is a collateral or secondary matter, the Court is to apply the law that exists at the time it renders its decision. Upon examining the nature of an award of interest on attorney's fees, the Court holds that interest on attorney's fees are merely collateral or secondary, and therefore, are awardable in this case for three reasons.

First, prior to the enactment of Section 114, plaintiffs in a Title VII action were entitled to interest on attorney's fees in private-sector cases. *See*, 42 U.S.C. § 2000e-5(k) (1982); *e.g., Rodgers v. United States*, 332 U.S. 371, 373-74, 68 S.Ct. 5, 6-7, 92 L.Ed. 3 (1947); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 764 & n. 6 (7th Cir.1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428, 77 L.Ed.2d 1315 (1983). The enactment of Section 114 merely extends an award of interest to cases involving the Gov-

ernment. Consequently, as a mere "extension" of prior law, Section 114 does not substantively change the parties' rights.

Second, the Supreme Court has held that since awarding attorney's fees is uniquely separable from the cause of action to be proved at trial, awarding such fees is a collateral issue. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-52, 102 S.Ct. 1162, 1166-67, 71 L.Ed.2d 325 (1982). It follows from *White* that a statute such as Section 114, that awards interests on those fees must also be a collateral issue.

Third, the Government can not contend that their substantive rights will be affected because prior to the enactment of Section 114, parties were already entitled to attorney's fees in private-sector cases. Section 114 merely added that interest on those fees shall also be payable in public-sector cases. Thus, Section 114 does not add a substantive obligation on the part of the Government. Moreover, Section 114 of the 1991 Act waives sovereign immunity with respect to interest.

Based on the foregoing, since an award of interest on attorney's fees is a collateral issue, Section 114 shall apply to this case and, therefore, the Plaintiff is entitled to interest on his attorney's fees.

II. *THE PLAINTIFF'S INTEREST ON ATTORNEY'S FEES SHALL BE CALCULATED BASED ON THE UNITED STATES TREASURY BILL RATE BECAUSE OF THE SUBSTANTIAL CASE LAW THAT APPLIES SECTION 1961(a) TO JUDGMENTS AWARDING ATTORNEY'S FEES.*

Since the Court has found that the Plaintiff is entitled to interest on attorney's fees, the Court must now decide the appropriate interest rate. According to the Plaintiff, the calculation should be based on the prime rate of interest for each year they were entitled to fees. (Pl's.

Mot. for Interest on Attorney's Fees at 9.) In his argument, Plaintiff cites to several cases that apply the prime rate of interest. *Id.* (citing *e.g., Alberti v. Klevenhagen,* 896 F.2d 927, 938 (5th Cir.1990) (prime rate of interest is applied to compensate counsel for delay in payment).

However, the fatal flaw in Plaintiff's argument is that those decisions used the prime rate when the payment of attorney's fees—not interest—has been delayed. In contrast, the Plaintiff, here, has already received attorney's fees. At issue is only the payment of interest.

In calculating the interest due the Plaintiff, the Court is, instead, persuaded that the statute providing for the payment of interest on a judgment shall apply. The statute, 28 U.S.C. § 1961(a), calculates interest due upon a judgment based upon the United States Treasury Bill rate. The statute provides:

> Interest shall be allowed on any money judgment in a civil case covered in a district court. . . . Such interest shall be calculated . . . at a rate equal to the coupon yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

28 U.S.C. § 1961(a) ("Section 1961"). Since it is well-settled that Section 1961 is used to calculate the interest due on a judgment awarding attorney's fees, *see e.g., Mid-America Fed. Savs. & Loan Ass'n v. Shearson/Am. Express, Inc.,* 962 F.2d 1470, 1475-77 (10th Cir. 1992); *cf. Oklahoma Aerotronics, Inc. v. United States,* 943 F.2d 1344, 1349 (D.C.Cir.1991), the Court shall apply the United States Treasury Bill rate of interest in determining the amount of interest due the Plaintiff.

In response to the Court's request, the Defendant computed the interest that would be due the Plaintiff for the

period ending November 21, 1991 in accordance with 28 U.S.C. § 1961(a). According to those calculations, the total amount of interest due is $21,952.68. The portion due Reed, Smith is $13,468.94 and the portion due the Lawyers' Commitee is $8,483.74.

Therefore, based on the Defendant's calculations, the Court shall award Plaintiff interest on his attorney's fees in the amount of $21,952.68.

CONCLUSION

For the foregoing reasons the Court shall award the Plaintiff interest on his attorney's fees based on the United States Treasury Bill rate of interest. The Court shall enter an Order of even date herewith.

APPENDIX C

[Filed Nov. 21, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1169
(CRR)

JAMES E. BROWN,

Plaintiff,

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

Order

Upon careful consideration of the parties' memoranda, the applicable law, and for the reasons articulated in the Opinion of the Court of even date herewith, it is, by the Court, this 21 day of November, 1994

ORDERED that the Plaintiff's Motion for Interest on Attorney's Fees and Costs shall be, and hereby is, GRANTED, in part; and it is

FURTHER ORDERED that in accordance with the preceding ordered paragraph, the Plaintiff shall be, and hereby is, awarded interest on his attorney's fees and costs in the amount of $21,952.68.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed Nov. 23, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1169
(CRR)

JAMES E. BROWN,
Plaintiff,

v.

JOHN O. MARSH, JR.,
Secretary of the Army,
Defendant.

ORDER

The Court isued an Order and Opinion in the above-captioned case on November 21, 1994. On page one under the "Appearances" section, Clifford E. Greenblatt is listed with the Defendant as an Assistant United States Attorney. However, Clifford E. Greenblatt should not be listed with the Defendant at all. Instead, Mr. Greenblatt should be listed with the Plaintiff as a member of Steptoe & Johnson and should be stricken from the Defendant appearance. The corrected Plaintiff appearance should read as follows:

> FOR THE PLAINTIFF: Roger E. Warin of Steptoe & Johnson, Washington, D.C. argued the case for the Plaintiff. With him on the briefs were Clifford E. Greenblatt and Charles F. Monk, Jr. of Steptoe & Johnson, Washington, D.C., Joseph M. Sellers of Washington Lawyers' Committee for Civil Rights Under Law, Washington, D.C., and John R. Erickson of Reed, Smith, Shaw & McClay, McLean, Va.

This change is not intended to change the meaning or substance of the Opinion or Order.

Accordingly, it is, by this Court, this 23 day of November, 1994.

ORDERED that page one, under the Appearances section, of the Court's Opinion issued in the above-captioned case on November 21, 1994, shall be, and hereby is, amended as explained above.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-5026, 95-5048

JAMES BROWN,
Appellee/Cross Appellant,

v.

SECRETARY OF THE ARMY,
Appellant/Cross-Appellee.

June 14, 1996

PETITION FOR REHEARING

Opinion for the court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge.

In his petition for rehearing, Brown argues that our prior decision in this case, in which we held that the provision of the 1991 Civil Rights Act that waives sovereign immunity from interest on attorney's fees is not to be applied retroactively, *see* 78 F.3d 645 (D.C.Cir.1996), is inconsistent with the Supreme Court's decision in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). Brown did not mention this case either in oral argument or in the letter he sub-

mitted listing the authorities upon which he had relied; we entertain Brown's present objection, however, because his reliance upon *Irwin* does not present a new (and therefore untimely) argument. Brown invokes *Irwin* merely as additional support for his proposition that the principle of strict construction applies only to the initial question whether the Congress has waived sovereign immunity, after which a court should consult ordinary principles of statutory construction in order to determine the scope of that waiver. We see no conflict between *Irwin* and our decision in this case.

The issue in *Irwin* was whether the doctrine of equitable tolling applies to the statutory filing deadline set out in Title VII for cases against the federal government. Irwin had filed a discrimination complaint with the EEOC, which dismissed the complaint and sent right-to-sue letters to Irwin and to his counsel. The letter to the attorney arrived at his office two weeks before the other copy reached Irwin, but the attorney was out of the country then and did not become aware of the letter until some time later. Irwin filed a complaint in district court 29 days after he had received the letter but 44 days after the letter was received at the attorney's office. The Fifth Circuit held that the 30-day filing limit provided in Title VII begins to run when notice of the EEOC's action is delivered to the office of claimant's counsel or to the claimant, whichever is first, 874 F.2d 1092, 1094 (1989); therefore, Irwin's claim was time-barred. Moreover, the court concluded, the statutory time limit in Title VII operates as an absolute jurisdictional limit, so that Irwin could not invoke equitable tolling to excuse his late filing. *Id.* at 1093, 1095.

The Supreme Court agreed with the Fifth Circuit's conclusion that the statute of limitations begins to run when notice of the EEOC action is delivered to the claimant or the claimant's counsel, whichever is first. With respect to the issue of equitable tolling, the Court observed

that a waiver of sovereign immunity "must be strictly construed," 498 U.S. at 94, 111 S.Ct. at 456, but nonetheless held that equitable tolling could be applied in Title VII cases against the federal government:

> Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

Id. at 95, 111 S.Ct. at 457. The Court ultimately affirmed the judgment of the Fifth Circuit because, on the particular facts of the case, equitable tolling was of no help to Irwin. *Id.* at 96, 111 S.Ct. at 457-58.

Brown argues that under *Irwin,* once we determined that the statute waives sovereign immunity from interest on attorney's fees, we should have resolved the question of retroactivity by applying the usual rules of statutory interpretation. His argument does not account, however, for a significant distinction between the provisions at issue in the instant case and those at issue in *Irwin.* In the latter case the Supreme Court addressed the question whether the statutory time limit for filing a Title VII claim against the federal government is subject to equitable tolling.

A clause that supplies a statutory time limit is not itself a waiver of sovereign immunity; it is rather a condition subsequent that the Congress may place upon the waiver. In Title VII the condition is that the complaint be filed within thirty days of the date when the plaintiff receives notice of final action taken by the EEOC. *Id.* at 94, 111 S.Ct. at 456-57. The waiver of sovereign immunity in Title VII clearly applied to the conduct and to the parties in *Irwin*; the issue was whether the plaintiff had satisfied

the condition subsequent. In this case, the issue is whether the waiver of sovereign immunity for interest applies in the first place. Accordingly, the statutory construction issue here arises in the first step of the inquiry described in *Irwin*—that is, whether the Congress waived sovereign immunity. The Supreme Court's application of the equitable tolling doctrine to the time limit in Title VII is therefore not at all inconsistent with this court's holding that a waiver of sovereign immunity is not to be applied retroactively unless the Congress so states.

Moreover, in *Irwin* the Court pointed out that the application of equitable tolling to the statutory time limit would "amount[] to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent. . . ." *Id.* at 95, 111 S.Ct. at 457. Here, in sharp contrast, application of the standard retroactivity analysis is not likely to reflect "a realistic assessment of legislative intent." Recall that the Congress enacted the interest provision in direct response to the Supreme Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (holding that 42 U.S.C. § 2000e-5(k), making the United States "liable for costs the same as a private person," should not be read to authorize interest on attorney's fees even though such interest was available against a private party) In *Shaw* the Court had reaffirmed the rule of strict construction and indicated that "[t]he no-interest rule provides an added gloss of strictness" upon that rule. 478 U.S. at 318, 106 S.Ct. at 2963. As we explained in our prior opinion, against the background of *Shaw*, in which the Congress was specifically advised that this type of waiver of sovereign immunity would be read narrowly, we see no reason to think that the Congress intended to waive sovereign immunity any more broadly than it provided by the terms of the amendment it enacted.

The petition for rehearing is therefore

Denied.

APPENDIX F

[Filed Jun. 14, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1995
80cv01169

No. 95-5026

JAMES BROWN,

Appellee,

v.

SECRETARY OF THE ARMY,

Appellant.

Consolidated with 95-5048

BEFORE: Edwards, Chief Judge, Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of Appellee/Cross-Apellant and of the response thereto, it is

ORDERED that the petition be denied, as is more fully set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: June 14, 1996

Opinion on rehearing filed by Circuit Judge Ginsburg.

APPENDIX G

[Filed Jun. 14, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1995
80cv01169

No. 95-5026

JAMES BROWN,

Appellee,

v.

SECRETARY OF THE ARMY,

Appellant.

Consolidated with 95-5048

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the Suggestion for Rehearing *In Banc*, of Appellee/CrossAppellant, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Tatel did not participate in this order.

Supreme Court, U.S.
FILED
NOV 14 1996
CLERK

No. 96-395

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES BROWN, PETITIONER

v.

TOGO WEST, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 114(2) of the Civil Rights Act of 1991 (1991 Act), 42 U.S.C. 2000e-16(d), which authorizes an award of interest against the federal government in Title VII actions, should be applied retroactively to award interest on attorney's fees that accrued before the effective date of the 1991 Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-395

JAMES BROWN, PETITIONER

v.

TOGO WEST, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 78 F.3d 645. The opinion of the district court (Pet. App. 19a-26a) is reported at 868 F. Supp. 15.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1996. A petition for rehearing was denied on June 14, 1996. Pet. App. 30a-35a. The petition for a writ of certiorari was filed on September 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until 1991, a prevailing plaintiff in an action against the federal government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, could recover attorney's fees but could not recover interest on that award. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). In 1991, Congress amended Title VII to provide, *inter alia*, for awards of interest against the United States with respect to backpay and attorney's fees. As amended by Section 114(2) of the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1079, Section 717(d) of Title VII now provides:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

42 U.S.C. 2000e-16(d). The 1991 Act thus changed the rule announced in *Library of Congress* v. *Shaw*, *supra*, that interest was not available against the United States in such actions. See *Landgraf* v. *USI Film Products*, 511 U.S. 244, 251 (1994). The 1991 Act was signed by the President on November 21, 1991.

2. Petitioner is a civilian employee of the United States Army who prevailed on the merits of a Title VII suit.[1] In the suit, petitioner alleged that the Army discriminated against him in 1975 when it refused to hire him for a GS-9 position. Pet. App. 1a. After resolving the merits of petitioner's Title VII

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[1] See *Brown* v. *Marsh*, 713 F. Supp. 20 (D.D.C. 1989), aff'd, 918 F.2d 214 (D.C. Cir. 1990), cert. denied, 502 U.S. 810 (1991).

claim, the district court, on August 20, 1992, awarded petitioner attorney's fees and costs pursuant to 42 U.S.C. 2000e-5(k). The court reserved judgment on the question whether interest on those fees was available—and, if so, from what date—pending the expected determination by the Court of Appeals for the District of Columbia Circuit of the retroactivity of another provision of the 1991 Act in *Gersman* v. *Group Health Ass'n*, 975 F.2d 886 (1992), cert. denied, 114 S. Ct. 1642 (1994). Pet. App. 2a-3a, 20a.

3. In *Gersman*, the court of appeals held that Section 101 of the 1991 Act, 105 Stat. 1071, which expanded the scope of the term "make and enforce contracts" in 42 U.S.C. 1981, is not applicable retroactively to cases that were pending on the date of its enactment. Subsequently, in *Landgraf* v. *USI Film Products*, *supra*, this Court held that Section 102 of the 1991 Act, 105 Stat. 1072, which granted plaintiffs a right to recover compensatory and punitive damages for certain violations of Title VII, and provides for trial by jury where such damages are claimed, does not apply retroactively. In so holding, the Court stated that where a statute contains no express command with respect to its temporal reach, a court must first determine whether the statute, if applied to events that occurred before its enactment, would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. Where a provision would have such an effect on a party's substantive rights, it is not to be applied retroactively "absent clear congressional intent favoring such a result." *Ibid.*

The Court in *Landgraf* observed that a somewhat different analysis is applicable to attorney's-fee pro-

visions, which are "collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." 511 U.S. at 277 (internal quotation marks omitted). The Court thereby distinguished *Bradley* v. *Richmond Sch. Bd.*, 416 U.S. 696 (1974), in which it had applied retroactively the attorney's-fee provision of the Educational Amendments of 1972. The *Landgraf* Court explained that "the new fee statute [at issue in *Bradley*] simply 'd[id] not impose an additional or unforeseeable obligation,'" when viewed "[i]n light of the prior availability of a fee award, and the likelihood that fees would be assessed under pre-existing theories." 511 U.S. at 278.

4. In 1994, following the court of appeals' decision in *Gersman* and this Court's subsequent decision in *Landgraf*, petitioner renewed his request for interest on his award of attorney's fees. The Army agreed that it was liable for interest on fees that accrued between the effective date of the 1991 Act (November 21, 1991) and the date on which those fees and costs were paid. It contended, however, that petitioner was not entitled to any interest for the period prior to November 21, 1991. Pet. App. 20a-21a.

The district court held that Section 114(2) applies retroactively to provide interest on attorney's fees incurred before the passage of the 1991 Act. The court reasoned that because Title VII plaintiffs were entitled to interest on attorney's fees in suits against private defendants before the enactment of Section 114(2), and because fee awards are "uniquely separable from the cause of action to be proved at trial" (Pet. App. 24a), retroactive application of Section 114(2) would not affect the parties' substantive rights. In the court's view, *Landgraf* and *Bradley* therefore

require that the provision be applied to all of petitioner's attorney's fees. Pet. App. 23a-24a.

5. The court of appeals reversed. Observing that Section 114(2) is a waiver of sovereign immunity and that such waivers must be strictly construed, the court concluded that Section 114(2) could not be applied retroactively absent clear evidence that Congress intended that result. Pet. App. 2a. Finding clear evidence of such an intent to be "[w]anting," the court reversed the award of interest on petitioner's pre-1991 Act attorney's fees and expenses. *Ibid.*

The court rejected the proposition that *Bradley* requires retroactive application of Section 114(2). It explained that "the principle of *Bradley* is applicable only to nonsubstantive matters; it does not displace 'the traditional presumption against applying statutes affecting substantive rights, liabilities or duties to conduct arising before their enactment.'" Pet. App. 6a (quoting *Landgraf*, 511 U.S. at 278). Although, in the court's view, "one might well infer" that Section 114(2) "would * * * fall within the play-it-as-it-lies principle of *Bradley*" (Pet. App. 6a), the court found the *Bradley* presumption to be inapplicable where, as here, the statute at issue entails a waiver of sovereign immunity. *Id.* at 18a.

Relying on *Library of Congress* v. *Shaw*, *supra*, and *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), the court concluded that the rule requiring strict construction of such waivers controlled its analysis here, both in determining whether the United States has consented to be sued, "and in defining the scope of that consent." Pet. App. 7a. While Section 114(2) contains an express waiver of sovereign immunity from interest awards, "Congress said nothing to indicate that the provision should be

applied retroactively." Pet. App. 12a. The court therefore held that to apply Section 114(2) retroactively "would be to impose upon the United States a liability to which it has not explicitly consented." Pet. App. 18a.

6. Petitioner sought rehearing. In denying the petition for rehearing, the court of appeals rejected petitioner's claim that *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), requires a different result.[2] In *Irwin*, the Court held that equitable tolling principles apply to Title VII's statute of limitations in suits against the government. The court of appeals distinguished *Irwin* on the ground that "[a] clause that supplies a statutory time limit is not itself a waiver of sovereign immunity; it is rather a condition subsequent that the Congress may place upon the waiver." Pet. App. 32a. Here, by contrast, the pertinent question is "whether the waiver of sovereign immunity for interest applies in the first place." *Id.* at 33a.

ARGUMENT

1. Petitioner contends (*e.g.*, Pet. 12, 21) that, under this Court's decision in *Landgraf*, Section 114(2) must be applied retroactively to award interest on attorney's fees that were incurred prior to November 21, 1991. In *Landgraf*, the Court stated that where a newly enacted statute "would impair rights a party possessed when he acted, increase a party's liability

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[2] This Court announced its decision in *Irwin* on December 3, 1990—before the enactment of the 1991 Act, and before the district court's and court of appeals' decisions in this case. The court of appeals "entertain[ed] [petitioner's] * * * objection, however, because his reliance upon *Irwin* d[id] not present a new (and therefore untimely) argument." Pet. App. 31a.

for past conduct, or impose new duties with respect to transactions already completed," it cannot be applied retroactively "absent clear congressional intent favoring such a result." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994). The Court therefore held that Section 102 of the 1991 Act, which authorized punitive damage awards against private defendants and compensatory damage awards against defendants generally, could not be applied retroactively. The Court explained that Section 102 would

> undoubtedly impose on employers found liable a 'new disability' in respect to past events. * * * The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored.

511 U.S. at 283-284.

Before the enactment of Section 114(2), the federal government was immune from paying interest on Title VII backpay and attorney's-fee awards. As the Court recognized in *Library of Congress* v. *Shaw*, interest on monetary awards against the United States is an additional element of damages traceable to the underlying unlawful conduct at issue. 478 U.S. 310, 314 (1986). By waiving sovereign immunity with respect to interest on such awards, Section 114(2) expanded the rights of prevailing plaintiffs in Title VII cases, thereby increasing the "*extent* of [the government's] liability." *Landgraf*, 511 U.S. at 283. *Landgraf* therefore bars the provision's retroactive application, absent a clear expression of contrary legislative intent. The court of appeals correctly held (Pet. App. 12a) that no evidence of such intent exists.

Accordingly, every court of appeals that has addressed the question has held that Section 114 may

not be applied retroactively. See *Woolf* v. *Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) ("[R]equiring the federal government to pay interest would disrupt the long-standing expectation created by the no-interest rule, and thus unquestionably would impose an important new legal burden on the federal government."); *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 & n.1 (10th Cir. 1994), cert. denied, 116 S. Ct. 417 (1996) (the rationale of *Landgraf* supports a presumption against retroactive application of Section 114 to backpay award); *Huey* v. *Sullivan*, 971 F.2d 1362, 1365 (8th Cir. 1992) (pre-*Landgraf* ruling that Section 114 does not apply retroactively to interest on backpay), cert. denied, 114 S. Ct. 1642 (1994). Petitioner contends that *Woolf*, *Edwards*, and *Huey* are distinguishable because they concerned interest on backpay awards that was "compensatory in nature," whereas interest on attorney's fees is "collateral to the main cause of action" and "separable from the cause of action to be proved at trial." Pet. 21. That argument is unavailing because the interest at issue here is not an element of "attorney's fees," as defined by Section 113 of the 1991 Act, 105 Stat. 1079 (42 U.S.C. 2000e-5(k)). Rather, it derives from Section 114, which applies to all elements of the judgment award in Title VII cases, including both backpay and attorney's fees. Petitioner's construction of Section 114 would require the untenable conclusion that Congress intended for the same provision to be retroactive when applied to attorney's fees, but purely prospective when applied to backpay awards.

Contrary to petitioner's contention (Pet. 11-13 & n.7, 21), *Bradley* v. *Richmond Sch. Bd.* is not to the contrary. In *Bradley*, the Court held that the attorney's-fee provision of the Education Amend-

ments of 1972 applies retroactively to impose fees in cases where legal services were performed before the statute was passed. The Court in *Landgraf* made clear, however, that *Bradley* "did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277. As we have explained, interest on attorney's fees is available only through Section 114. By its own terms, Section 114 is not an element of attorney's fees but, rather, is expressly intended "to *compensate* for delay" in payment. The Court in *Library of Congress* v. *Shaw*, moreover, reiterated "the historic[] view that interest is an element of damages separate from damages on the substantive claim." 478 U.S. at 314. Retroactive application of the interest provision in Section 114(2) would impermissibly "increase [the government's] liability for past conduct" in the absence of clear evidence that Congress intended that result. *Landgraf*, 511 U.S. at 280.[3]

2. The court of appeals held that the doctrine of sovereign immunity bars the retroactive application

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[3] Petitioner's analogy (Pet. 20) to expert fees, which were added to Section 113 of the 1991 Act as a component of attorney's fees, is misplaced. Attorney's fees are not subject to the usual presumption against retroactivity because such fees are "collateral" to the main cause of action. *Landgraf*, 511 U.S. at 277. Unlike the interest liability contained in Section 114, Section 113 specifically makes expert fees an element of attorney's fees, for which the United States was liable before the 1991 Act. See *Library of Congress* v. *Shaw*, 478 U.S. at 319 ("Title VII's provision making the United States liable 'the same as a private person' waives the Government's immunity from attorney's fees, *but not interest*.") (emphasis added).

of Section 114(2).[4] As petitioner recognizes (Pet. 16), "a waiver of the Government's sovereign immunity will be strictly construed *in terms of scope*, in favor of the sovereign." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996) (emphasis added). Any ambiguity in such a waiver must be strictly construed in favor of the government. See, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. at 318; *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 685. Section 114(2) applies solely to suits against the federal government. Although that provision clearly waived sovereign immunity for interest against the government in Title VII cases, Congress did not expressly make the provision retroactive, so as to allow for interest on judgments entered before its effective date.[5]

Petitioner contends (Pet. 18-19) that the decision below "conflicts" with *Woolf*, *Edwards*, and *Huey* be-

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[4] In our briefs before the court of appeals, we relied solely on this Court's decision in *Landgraf* to support our position that Section 114(2) does not apply retroactively. However, in response to the request of the court of appeals that the parties be prepared at oral argument to address the application of the doctrine of sovereign immunity to the retroactivity question (see Pet. 5), the government argued that principles of sovereign immunity also were a bar to retroactivity in this case.

[5] Petitioner's reliance (Pet. 17-18) on *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), is misplaced. In *Irwin*, the Court held that the doctrine of equitable tolling applies to Title VII's limitations period in suits against the United States. The court below distinguished *Irwin* on the ground that the "waiver of sovereign immunity in Title VII clearly applied to the conduct and to the parties in *Irwin*; the issue was whether the plaintiff had satisfied the condition subsequent" that Congress placed upon the waiver. "In this case, the issue is whether the waiver of sovereign immunity for interest applies in the first place." Pet. App. 32a-33a.

cause those cases did not principally rely on sovereign immunity principles to conclude that Section 114(2) does not apply retroactively. The fact remains, however, that no court of appeals has ever held that Section 114(2) applies retroactively. Indeed, the court in *Huey* expressly stated that "the policy requiring that waivers of sovereign immunity be construed strictly in favor of the United States * * * makes a finding of no retroactivity even more compelling in this case." 971 F.2d at 1365-1366. There is no conflict among the circuits with respect to the question presented here. See Pet. i; see also *Texas* v. *Hopwood*, 116 S. Ct. 2581, 2582 (1996) (Ginsburg, J., respecting the denial of the petition for a writ of certiorari) ("[T]his Court * * * reviews judgments, not opinions.") (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996